**CASE NOS. 15-1074, 15-1130**

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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AMPERSAND PUBLISHING, LLC d/b/a Santa Barbara News-Press

*Petitioner/Cross-Respondent,*

v.

NATIONAL LABOR RELATIONS BOARD

*Respondent/Cross-Petitioner.*

GRAPHICS COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

*Intervenor,*

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# INTERVENOR'S BRIEF

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| AMPERSAND PUBLISHING, LLC d/b/a SANTA BARBARA NEWS-PRESS,<br><br>*Petitioner/Cross-Respondent*,<br><br>v.<br><br>NATIONAL LABOR RELATIONS BOARD,<br><br>*Respondent/Cross-Petitioner*<br><br>and<br><br>GRAPHICS COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,<br><br>Intervenor, | CASE Nos. 15-1074, 15-1130<br><br>Board Case Nos. 31-CA-028589 et al. |

**CERTICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for Intervenor Graphics Communications Conference of the International Brotherhood of Teamsters ("Intervenor") certifies the following:

(A) **Parties and Amici:** All parties, intervenors, and amici appearing before the Board and in this court are listed in the Brief for the NLRB.

(B) **Rulings Under Review:** References to the rulings at issue appear in the Brief for the NLRB.

(C) **Related Cases:** This case has not previously been presented to this Court. Intervenor agrees with the NLRB's certificate on this subject.

DATED: September 30, 2016

Respectfully submitted,

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# TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Supreme Court Opinions**



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*Authorities upon which we chiefly rely are marked with asterisks.

**Federal Court Opinions**

**NLRB**

**United States Code**



**Rules**

# I. SUMMARY OF ARGUMENT

## A. Editorial Control Of Newspaper Content Is Not Autocratic Control of the Workplace

In its opening brief, the Santa Barbara News-Press attempts to frame this case – in which it was found to have committed multiple unfair labor practices destructive of the collective bargaining process and antithetical to the core purposes of the National Labor Relations Act ("NLRA" or "Act", 29 U.S.C. § 141 *et seq*) -- as one about "editorial control" (Brief, p. 2). In its view, that characterization provides it with a blanket constitutional license to traffic in those very NLRA violations, without limit as to time or substance. This defense is unsupported by law, and undermined by the record developed in this case.

The Board largely affirmed Administrative Law Judge Clifford H. Anderson's decision based on a careful, thorough review of that extensive record, which establishes that the News-Press acted, at and away from the bargaining table, to undermine the Union's collective bargaining role. That misconduct is in no way shielded by its status as a newspaper publisher. Nor is the *News-Press* rendered immune from answering for its malfeasance by any act, words or proposals authored by the Union or any represented employee in this case.

### B. The *News-Press'* Insistence on Proposals that Would Erase the Union's Bargaining Rights and the Employees' Voice was Patent Bad Faith

The record is replete with proof that the *News-Press* cannot abide the fact that its "right to exercise sole discretion changed once the Union became the certified representative." *Camelot Terrace* (Dec. 30, 2011) 357 N.L.R.B. 1934, 1994, enf'd *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085 (D.C.Cir. 2016); *Goya Foods* (2006) 347 N.L.R.B. 1118, 1120, enf'd in relevant part *NLRB v. Goya Foods*, 525 F.3d 1117 (11th Cir. 2008). As detailed below and in the NLRB's brief, Petitioner's bargaining proposals seeking to confine the Union to a position worse than having no contract at all, coupled with its significant unilateral changes in terms and conditions of employment and other hallmark unfair labor practices, call for condemnation by this Court and enforcement of the Board's order in its entirety.

## II. RESPONDENT FAILED TO PROVE THAT ITS RIGHT TO EDITORIAL CONTROL SHIELDS IT FROM THE OBLIGATION TO BARGAIN IN GOOD FAITH AND OTHERWISE COMPLY WITH THE NLRA

### A. The *News-Press* Waived Its First Amendment Arguments

The Union agrees with, and adopts, the NLRB's arguments that the *News-Press* has waived its First Amendment arguments for consideration by this Court by not raising them first with the Board, as it had ample opportunity to do (NLRB brief, pp. 24, 71-76, referring to Petitioner's brief, pp. 20-31). Because of the profound and dangerous procedural and substantive precedent that would follow from adoption of Petitioner's sweeping First Amendment immunity defense, the Union addresses the substance of that destructive position.

### B. The NLRA, A Law of General Application, Applies to the *News-Press*

The NLRA remains in effect at Petitioner's newsroom, and its force has not been eternally blunted by the events of 2006-2007, or by this Court's 2012 ruling relating to them.[2] The First Amendment does not afford this newspaper employer

[2] E.g., *East Texas Pulp And Paper Company and Ike E. Baugh* (1963) 143 N.L.R.B. 427, 446, *NLRB v. East Texas Pulp & Paper Co.* (5th Cir. 1965) 346 F.2d 686 [Employees who had engaged in unprotected activity and were fired did not lose all statutory protection; in the words of the Trial Examiner, "(t)hey did not become *caput lupinum*"]. By the same token, this Court cannot declare the Union

any more privilege to violate the NLRA than any other employer, *Associated Press v. NLRB* (1937) 301 U.S. 103, 132-133[3]; see, *Chamber of Commerce of the United States v. Brown*, 128 S. Ct. 2408, 2417 (2008) (Employers' First Amendment right protects them against sanctions for *noncoercive* speech); *Fleming v. Lowell Sun Co*., 36 F. Supp. 320, 327 (D. Mass. 1940), vacated on other grounds, 120 F.2d 213(1st Cir. 1941), aff'd by equally divided Court 315 U.S. 784(1942) ("To provide [in the Fair Labor Standards Act] for the general well being of employees of newspapers engaged in interstate commerce is a provision for the public good and does not in any way tend to fetter a free press. It would be unfortunate if the employees of the press were deprived of the benefits of this general legislation that would do so much to improve their general welfare, upon any plea that the press is sacrosanct. The legislation involved here does not even remotely tend to control or restrain freedom and liberty to publish news.")

This Court did not suggest that its denial of enforcement of the Board's *Ampersand I* order would apply beyond the confines of the time frame and record developed in that case. 702 F.3d 51, 58-59 (D.C..Cir. 2012).To expand that non-

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and the employees it represents to be perpetual outlaws subject to ongoing expunction of their rights based on the scenario described in *Ampersand I.*

[3]See also *Cohen v. Cowles Media Co.* (1991) 501 U.S. 663, 669-670 ("Enforcement of . . . general laws [including the NLRA] against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.")

enforcement zone to the facts and circumstances of this case would not effectuate the purposes of the Act, and would be punitive as against the newsroom employees entitled to the Act's protection. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 806 (D.C. Cir. 1997).

By the same token, there is no legal authority empowering the NLRB to carve out editorial employees of a newspaper or other media employer, to expose them to the otherwise statutorily violative discretion of their employers, or to withdraw its Congressionally-mandated oversight of the collective bargaining process in connection with such employees and their chosen representative. See, e.g., *Livadas v. Bradshaw*, 512 U.S. 107 (1994). Nor is there any law or precedent that suggests that an *organizing campaign* that criticizes or even advocates for the right to influence through collective bargaining the arbitrary exercise of managerial prerogative somehow relieves the employer of the Act's regulation of the separate ensuing *collective bargaining process*, regardless of the employer's of Union's post-campaign conduct at and away from the bargaining table.

### B. The NLRB's Authority to Order Employee Reinstatement Does Not Impinge Upon the *News-Press'* Legitimate Right to Editorial Control

The *News-Press* argues that the mere fact that employee reinstatement may be part of a remedy impinges on its First Amendment right to editorial control,

because, according to the Petitioner, "government intrusion into [the publisher's decisions as to who will write newspaper content] necessarily impact(s) its ability to direct the content of its paper." (Brief, p. 2). Further in its brief, it qualifies that contention where it asserts that "the forced re-hire of a news reporter employee *terminated for reasons related to content* is constitutionally impermissible due to its potentially chilling effect on the publisher's speech." (Brief, p. 29; emphasis added)

This argument is unavailing for several reasons.

First, the personnel decisions at issue in this case were admittedly *not* related to editorial content. The *News-Press* did not claim to have suspended or fired bargaining committee member Dennis Moran or laid off columnist Richard Mineards for editorial reasons, or because either posed a threat or challenge to its editorial control. Nor did the Petitioner claim it had editorial reasons for its widespread post-union election resort to temporary employees. In all three instances, the Board properly found that the reasons for the *News-Press'* decisions were violative of the Act, or were subject to bargaining preceding implementation.

Second, the newspaper's constitutional right to editorial control is not completely congruent or coterminous with the right to be free of government regulation of labor relations in the workplace. That right of non-interference extends to the content of the newspaper, but not to the racial, national origin, age,

gender, disability or other identifying characteristics of the individual reporter. Nor, since *Associated Press v. NLRB*, does it extend to an ability to refuse reinstatement of a reporter who has been unlawfully discharged under the NLRA.[4] That is, the First Amendment does not privilege a publisher to deny a reporter employment because of his exercise of his right to organize or support a union; nor does it permit a newspaper to adversely affect a reporter's terms and conditions of employment for anti-union reasons. *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1552, 1554, and 1556 fn.19, 116 L.R.R.M. 2721 (D.C. Cir. 1984). Instead, it permits the employer to control content created by that reporter for publication in the employer's paper, as this employer has done and continues to do in accordance with its process summarized below.

Thus, when a publisher hires a reporter, or is ordered to rehire an unlawfully-fired reporter, that publisher at all times maintains its control over the content it publishes, and can direct what that reporter writes and writes about – and by the same token, can direct that the reporter *not* write for the newspaper about certain subjects or stories, and/or to include or exclude statements as it wishes. In short, the reporter's identity, personal characteristics or union affiliation are *not* part of the newspaper's published message or content, and thus the publisher is not

[4] *Newark Morning Ledger*, 21 NLRB 988, 1020-1021 (1940) (Reporter fired because of her union activity and leadership ordered reinstated).

immune from government regulation and remedial authority relating to the publisher's hiring judgment in those areas.

In this case, Petitioner has not even attempted to show that the re-hiring of Moran or Mineards, or the replacement of temporary employees with permanent ones – who could turn out to be the same employees – somehow would have an impact on its ability to control newspaper content. As will be explained *infra*, its degree of control of the editing and publication process remains precisely the same regardless of whether or not it must rehire and make whole an unlawfully terminated employee.

The *News-Press* relies for its argument that discriminatee reinstatement would somehow infringe on its First Amendment rights on cases addressing direct restriction of the speaker's expression, including *Hurley v. Irish Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557 (1995); (Parade marchers whose participation would itself have conveyed a public message unwanted by parade sponsors); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978) (Corporate speech in political campaigns); and *Overstreet ex rel. NLRB v. United Brotherhood of Carpenters and Joiners of America*, 409 F.3d 1199 (9th Cir. 2005) (Union bannering). At the same time, it misapplies or ignores the longstanding approval of NLRB reinstatement orders against newspaper employers established in *Associated Press v. NLRB*, 301 U.S.

103 (1937). See, *Dominguez v. FS1 Los Angeles, LLC*, 2016 U.S. Dist. LEXIS 65657 (C.D. Cal. May 17, 2016)(Motion to dismiss age and gender employment discrimination complaint against media employer on First Amendment grounds denied, because "Defendant cannot demonstrate that there is a relationship between its ability to choose its reporter on the basis of sex, gender, or any other characteristics prohibited by Title VII, and its ability to control the content and character of its shows.")(and see cases cited at footnote 9 *infra*).

### C. The Editing Process Affords Newspaper Ownership Full Content Control

In keeping with this limitation on a publisher employer's rights in the labor relations area, it is helpful to keep in mind that intrinsically, once the newspaper hires someone other than the owner herself to perform writing services, the publisher necessarily, as a practical matter, thereby relinquishes a certain amount of absolute authority over the paper's content. The same is true when she hires editors to assist in the writing. It is in fact through the editing process that management, and ultimately the owner, can control the newspaper's content. The NLRB explained the necessarily collaborative editing process as it occurs at the *News-Press* as follows, 357 NLRB 452, 483 (2011):

> After a story is written it is sent to the editor who assigned the reporter to write it. The assigning editor reviews it and checks it for grammar, misspellings, completeness, and bias, among other things. If the story is lengthy and in depth then the assigning editor may review it several

> times as it is being created and discuss it as needed with the reporter. From there the story is reviewed by another editor who again reviews the story for, among other things, any bias. After review by the other editor the story goes to the copy desk where a headline is created by a copy desk editor. In other words, one of the key functions of the editors is to review the stories prepared by reporters to assure that the stories are not biased. And the identification and elimination of bias is a process that starts but does not end with the reporter. In this regard it is important to note that there is no evidence that the role editors played in attempting to eliminate bias or that the standards that they were to apply concerning what constituted bias were changed by McCaw and von Wiesenberger when they became copublishers.[5]

### D. Ampersand's Purported License to Commit Unfair Labor Practices Has Expired

Can it really be the law, as Ampersand contends, that if during an organizing campaign a Union or supportive employees denounce the unethical treatment of newsroom staff, or the paper's editorial stance, that that newspaper's management is thereafter forever free, on into the bargaining phase, to violate the NLRA at will with respect to those employees and their colleagues, to retaliate against individuals, and instruct its negotiators to pretend the Union is not really present at the bargaining table? As preposterous as this question sounds, the *News-Press'* "constitutional license" argument asks this Court to order the Board to approve its past and presumably future transgressions, including to: 1) carve out protective shields or NLRA-free zones for media employers where their editorial prerogative

[5] For a similar discussion of newspaper procedure and structure, see *Washington Post Co.*, 254 NLRB 168, 200-203 (1981).

is questioned; 2) plunge editorial employees into the void of NLRA lawlessness where employer *retaliation* for union activity, rather than the union activity itself, would be protected; 3) endorse the punishment of any and all newsroom employees *at the collective bargaining stage* and thereafter for alleged offenses committed during the pre-bargaining period; 4) grant employers the unfettered ability to bargain in bad faith; and 5) approve the hiring of people to perform bargaining unit work and label them non-employees to undermine the union on grounds that to regulate such hiring interferes with content control. That is not, and cannot be, the law. Indeed, the one federal court addressing this argument -- in the context of an NLRB subpoena enforcement proceeding pursuing yet further *News-Press* labor violations yet to be tried -- rejected it, declaring that "(n)either the [Ninth[6] or this Circuit] hold that by virtue of existing, the Union has an 'improper purpose' … or offends the First Amendment in perpetuity." *NLRB v. Ampersand Publ'g, LLC*, 2015 U.S. Dist. LEXIS 176001 (C.D. Cal. Dec. 1, 2015); adopted at U.S. Dist. LEXIS 15813 (C.D. Cal. Feb. 3, 2016), appeal pending.[7]

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[6] *McDermott ex rel. NLRB v. Ampersand Publ'g*, 593 F.3d 950 (9th Cir. 2010).

[7] The Court further noted that "(n)either the Ninth Circuit nor the D.C. Circuit held that *News-Press* had no obligation to bargain with the Union going forward. Nor did either Circuit find that *News-Press* was immune from subsequent allegations of unfair labor practices. See [*Ampersand II*], 702 F.3d at 55-59; *Ampersand I*, 593 F.3d at 957-66."

Indeed, long ago this Court recognized the temporal limitations on the notion that a remedial order –or by extension in this case, a refusal to issue one – can have eternal vitality. In *Press Co. v. NLRB*, 118 F.2d 937, 954 (D.C. Cir. 1941), the Court was called upon to decide the propriety of the breadth and scope of an NLRB remedial order against a newspaper employer ordering it to reinstate and make whole three editorial employees. Balancing the need for law enforcement with the need for proportionality and relationship between conduct and decree, the Court observed that:

> It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union.

118 F.2d at 955. By the same token, this Court's *refusal* in 2012 to enforce the Board's remedial order in *Ampersand I* because of threats to the *News-Press'* editorial prerogatives in that case respectfully cannot continue in force without new and independent factual and evidentiary support (which is not present in this record). Where, as here, the union's and employees' bargaining conduct in this separate time and contextual frame reveals no such alleged threat, and indeed, a disavowal of any such encroachment (see summary of Union bargaining conduct,

NLRB brief, pp. 67-71), there is no basis for continuing to approve a workplace regime stripped of labor law protection. Indeed, to perpetuate that lawless environment would squarely conflict with the Board's broad remedial authority and "the high degree of deference" this Court affords the Board's choice of remedies. *Fallbrook Hosp. Co. v. NLRB*, 785 F.3d 729, 738 (D.C. Cir. 2015); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 315, 171 L.R.R.M. 2944 (D.C. Cir. 2003).

It is thus telling that Petitioner exclusively invokes the *pre-bargaining chronology and events* located in the record and findings derived from *Ampersand I* to fallaciously pursue the same objective of maintenance *ad infinitum* of a newsroom bereft of NLRA regulation, associational and statutory rights[8]. As the NLRB has explained, however (NLRB brief, pp. 70-71), the Employer does have available to it recourse at the bargaining table when lawful proposals truly encroach on the "core of entrepreneurial control": it can simply refuse to bargain over genuinely permissive bargaining subjects. The First Amendment does not reach so far as to privilege Ampersand to flout its statutory obligations based on its status as a publication. *Newspaper Guild of Greater Philadelphia v. NLRB*, 636

[8] The din created by the *News-Press'* caterwauling about its constitutional rights must not drown out the Union and individual employees' enjoyment of their expressive rights under the Constitution and the NLRA, see, e.g., *DirecTV, Inc. v. NLRB*, 2016 U.S. App. LEXIS 16940 (D.C. Cir. Sept. 16, 2016).

F.2d 550, 558 (D.C. Cir. 1980) ("It is firmly established that a newspaper is not immune from the coverage of the National Labor Relations Act merely because it is an agency of the press."). Indeed, this Court in the *Newspaper Guild* case remarked that in considering the bargainability of ethics rules, the Board could not simply demarcate a line between the rules themselves that were arguably within managerial prerogative, and their consequences to employees, which were bargainable, but instead, had to review the rules to see if "the degree of control which may be exercised was. . . narrowly tailored to the protection of the core purposes of the enterprise", and balanced between the employer's freedom to manage its business in areas involving the basic direction of the enterprise and the right of employees to bargain on subjects which affect the terms and conditions of their employment." 636 F.2d at 561-562 and n. 36.

In short, the Board must perform, and this Court should defer to, the same balancing test for employers who publish as it does for employers who are not in the publishing or media business. Nothing in the law privileges a newspaper to arbitrarily tie each and every Union bargaining proposal to its editorial content, and then not merely refuse to bargain over them, but seize upon the very alleged attempt by a Union to invade its unbound sanctum of editorial control to use as a blackjack to assault its employees through retaliatory unfair labor practices. Yet this is precisely what the *News-Pres*s asks this Court to authorize by overturning,

on constitutional grounds, the Board's findings of bad faith and of multiple other violations.

## III. THE BOARD'S FINDINGS ON PERSONNEL ISSUES ARE NOT VULNERABLE TO A FIRST AMENDMENT CHALLENGE[9]

The *News-Press* again ventures too far out on a First Amendment limb by arguing that the NLRB -- and presumably other agencies or courts -- cannot dictate the reinstatement of unlawfully discharged newsroom employees, because doing so interferes with its editorial prerogative and control over the content of the newspaper. (Brief, pp.28*ff*).[10] This argument, even if not waived for failure to raise it before the NLRB, is wrong both as a legal and practical matter.

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[9] Because the *News-Press* rests its entire defense of its violative conduct on what it calls "personnel matters" -- e.g., the use of temporary employees, suspension and discharge of union bargaining committee member Dennis Moran, layoff of writer Richard Mineards -- on the First Amendment (an argument it has waived in this Court), it thereby forsakes any other argument about the Board's correct conclusions that those decisions and actions are in violation of the NLRA.

[10] That lack of privilege to violate the NLRA based on newspaper publisher status -- which has been embedded in American constitutional law at least since the Supreme Court approved the reinstatement of an editorial employee in the *Associated Press* case in 1937 -- is the fundamental flaw in the Petitioner's sweeping view of its continuing license to commit unfair labor practices. See *Brown v. Boston University*, 891 F.2d 337, 360 (1st Cir. 1989); (Reinstatement of professor unlawfully denied tenure does not infringe on university's First Amendment right to "academic freedom"); *Hausch v. Donrey*, 833 F. Supp. 822 (D. Nev. 1993) (No First Am. protection from EEO action); *Communications Workers v. Radio Station WUFO*, 121 LRRM 2986 (W.D.N.Y. 1985) (Arbitration award ordering reinstatement of part-time religious radio announcer is valid and

At first in its argument, Petitioner places a seemingly defensible qualification over its overarching "staffing equals content" position by saying that a "forced re-hire of a news reporter *terminated for reasons related to content*" is constitutionally impermissible." (Brief, p. 29). Because Ampersand did not contemporaneously claim that any of the personnel decisions at issue in this case were made for content-related reasons, however, the reporters' reinstatement would not offend this principle. Thus, the *News-Press* laid off Richard Mineards ostensibly for economic reasons, fired union bargaining committee member Dennis Moran because of alleged misconduct, and employed temporary employees based on alleged past practice. While none of these stated reasons comported with the truth[11], and the Board found all to be pretexts for anti-union motivations, the *News-Press* never claimed that it had a First Amendment basis for making the personnel decisions that the Board and Union successfully challenged as violative of the NLRA. Thus, because the Petitioner cannot adorn its unfair labor practices with the cloak of editorial prerogative, and as explained above and in the NLRB's brief, it is not entitled to the sweeping immunity it seeks stemming from *Ampersand I*, this

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not infringement of radio station's First Amendment right to determine style and content of programming).

[11] *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1244-1245, 193 L.R.R.M. 2001, (D.C. Cir. 2012)(Newspaper's post-termination reasons for employee discharge and refusal to reinstate were pretextual)

Court should reject its extended ULP license arguments as to all of its personnel decisions.

As for the *News-Press'* defenses relating to its other non-personnel decisions and ULPs – e.g., unilateral abandonment of annual merit wage increases[12], change in productivity requirements[13], delay in producing requested information[14], and threats against employees who share information with each other and outsiders[15] or who cooperate with NLRB investigations – these are even farther removed from the protection of any theoretical constitutional umbrella, and the Board's findings as to them must be approved by this Court.

[12] *Care One at Madison Ave., LLC v. NLRB*, 2016 U.S. App. LEXIS 14824, 207 L.R.R.M. 3006 (D.C. Cir. Aug. 12, 2016) ("an employer may not withhold a wage increase that would have been granted but for a union organizing campaign.", quoting *Federated Logistics v. NLRB*, 400 F.3d 920, 927 (D.C. Cir. 2005).

[13] *Robert Orr/Sysco Food Services, LLC*, 343 N.L.R.B. 1183, (2004).

[14] See, *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 113 L.R.R.M. 3163 (D.C. Cir. 1983); *Britt Metal Processing, Inc.*, 322 NLRB 421, 425 (1996), affd. mem. 134 F.3d 385 (11th Cir. 1997).

[15] *Quicken Loans, Inc. v. NLRB*, 2016 U.S. App. LEXIS 13778, 206 L.R.R.M. 3685 (D.C. Cir. July 29, 2016)(Employer rule prohibiting employees from sharing employee information properly found to violate the Act.)

## IV. THE BARGAINING EXPENSES REMEDY IS AUTHORIZED AND WARRANTED[16]

### A. Bad Faith From the Outset of Bargaining (November, 2007)

Almost nine years ago, after the Board rejected its frivolous election objections in August, 2007, the News-Press began its bad faith bargaining, instead of engaging in a "technical" refusal to bargain that would have triggered judicial review of the Union's certification[17]. Undoubtedly counting on eventually receiving no more than an admonition not to continue its bad faith while inflicting damage on the union and the newsroom and gaining the advantages of a lengthy delay[18], the News-Press insisted at the negotiations table on a pre-union regime that would be worse than no contract at all, including:

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[16] As the Board aptly points out (NLRB Brief, p. 28), Ampersand has waived any challenge it could have presented as to the Board's remedial order, including that for payment of the Union's bargaining expenses, by merely mentioning it in passing without offering any substantive argument or supportive authority. *Williams v. Romarm, S.A.*, 756 F.3d 777, 783 (D.C. Cir. 2014), citing, *inter alia*, *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000). Intervenor offers some supportive authority for the Court's consideration.

[17] *Alois Box Co. v. NLRB*, 216 F.3d 69, 76 (D.C. Cir. 2000).

[18] *Marion Hosp. Corp. v. NLRB*, 321 F.3d 1178, 1187 (D.C. Cir. 2003)("It is rational to presume a link between a prior unlawful refusal to bargain and a subsequent employee repudiation of the union because 'lengthy delays in bargaining deprive the union of the ability to demonstrate to employees the tangible benefits to be derived from union representation. Such delays consequently tend to undermine employees' confidence in the union by suggesting that any such benefits will be a long time coming, if indeed they ever arrive.'",

- no genuine protection from arbitrary discipline against which the employees sought shelter through union representation;
- a contract -- if one were to be agreed upon -- to be overseen, absurdly, by the co-publishers instead of an arbitrator; and
- overflowing management rights that could be unilaterally exercised on all essential economic terms even during the term of a one-year CBA designed to invite decertification.

Away from the table, Ampersand built upon its refusal to engage at the table, with the unlawful discharge of one of the last remaining active union supporters (bargaining committee member Dennis Moran), and with other actions designed to quash the subsisting vitality of union support, such as the unprecedented use of temporary and "contract" employees to perform bargaining unit work, discontinuance of annual merit raises, layoffs of unit employees, warnings to employees not to discuss those changes, and affirmative discouragement against cooperation with the NLRB's investigations.

The Ninth Circuit Court of Appeals in *Frankl v. HTH*, 650 F.3d 1334, 1358 (9th Cir. 2011) confirmed in the 10(j) context that this kind of misconduct constitutes intentional, blatant and obvious bad faith:

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quoting *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1458 (D.C. Cir. 1997).)

> [T]he Board has held that a proposal that vested exclusive control in the employer on the setting of wages, while offering little more than the status quo in return, was significant evidence of an intent to frustrate agreement, and in conjunction with other indicia of bad faith, violated of (sic) Section 8(a)(5) of the Act." … More generally, while "the mere insistence upon a management-rights clause is not a per se violation of the Act, the Board has consistently held that a violation is made out when, as here, the employer demands a contractual provision which would exclude the labor organization from any effective means of participation in important decisions affecting the terms and conditions of employment of its members." … Taken together, the Hotel's proposed recognition clause, management rights provision, and one-sided grievance procedure would exclude the Union from any meaningful representational role. As a result, the Board was likely to find that the Hotel's insistence on these three clauses is exceedingly persuasive evidence of the Hotel's lack of good faith in bargaining during 2006. (emphasis added).*NLRB v. Johnson Mfg*., 458 F.2d 453, 455 (5th Cir. 1972).

**B. Petitioner's Bargaining Stance is Indefensible**

The *News-Press* did not merely insist on a "broad" management rights clause, as it understates in its brief (p. 76). In truth, it demanded a clause, combined with its other proposals it remained adamant about, that was both predictably unacceptable and worse than no contract at all, because it sought to erase the right to bargain and waive the protection from unilateral changes the law affords even represented employees who lack a collective bargaining agreement. That was because the clause expressly heralded back to the pre-union period, where the *News-Press* enjoyed the unilateral right to impose terms and conditions of employment, a right the newspaper lost as a consequence of the September, 2006 secret ballot election. This is a classic and patent bad faith approach to

collective bargaining, as the Board found. See, e.g., *Majure v. NLRB*, 198 F.2d 735, 739, 30 L.R.R.M. 2441 (5th Cir. 1952). (Employer violated §8(a)(5) by insisting on a management rights clause that would "retain the power of unilateral control of each and every feature of the rates of pay, hours of work, and all conditions of employment ".) Put another way, this intransigent stance adopted by the *News-Press*, which if agreed upon would have eviscerated the Union's collective bargaining role, was thus designed to "destroy" the union and for that reason was in bad faith. *USW v. NLRB*, 390 F.2d 846, 849 (D.C. Cir. 1967)("(A) key object of the requirement of collective bargaining is that management concede the existence of the employee labor organization. Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1407-09 (1958). As the Supreme Court said in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 484-85, 4 L. Ed. 2d 454, 80 S. Ct. 419 (1960): 'That purpose of 8(a)(5) is the making effective of the duty of management to extend recognition to the union; the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union.'. . . ") See also, *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872 (11th Cir. 1984); *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1224 (D.C. Cir. 1990)("…for the employer to go to impasse over whether it has to deal with the union … is the antithesis of good faith collective bargaining, which requires the employer to accept the legitimacy of the union's role in the process.")

Ampersand's arguments in support of its patent bad faith all fail.

1. The *News-Press*' Meager Movement at the table Petitioner makes much of its tiny concession to move from no procedures whatsoever to challenge employer action, to an illusory one in which the publishers had final say over any alleged contract violation (Brief, pp. 75-76, fn.14). It steadfastly refused, however, to accept the standard arbitration procedure before a neutral decisionmaker. Especially given the *News-Press'* demands for virtually limitless unilateral discretion on all important economic, disciplinary and other terms of employment, it is difficult to discern what matters might have been even subject to upper management's one-sided review of its own Labor Relations regime.

2. Withdrawal of no-strike clause The *News-Press* also asks this Court to seriously consider its withdrawal of a "no-strike" clause, which would enable the newsroom employees to strike in response to management's contract violations (Brief, p. 77). Again, aside from whether there would or could be any conceivable contract violations to strike over in light of the state of Ampersand's proposals, mindful of this employer's extreme anti-union stance and proven penchant for hiring "temporary" employees, striking would likely be precisely what Ampersand would have liked to see, in order to promote yet further damage to the Union's collective bargaining rights, and ability to represent the newsroom employees.

Further, contrary to the Company's argument, the absence of a "no strike

clause" would *not* be different or better than having no contract at all, because even unrepresented employees have a protected right to withhold their labor under Section 7 of the NLRA. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 6 L.R.R.M. 669 (1940)(Section 7 codified and regulated, but did not "create" the right of self-organization, although it provided protection for the right to strike.); *NLRB v. Buzza-Cardozo*, 205 F.2d 889, 32 L.R.R.M. 2438, (9th Cir. 1953) (Unrepresented employees who struck to protest employer wage policy engaged in protected activity under §7). Cf. *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, (U.S. 1921) (Right to strike acknowledged as lawful prior to enactment of NLRA).

3. The Extent of Bargaining Cements Petitioner's Bad Faith Petitioner asserts that it cannot be deemed to be in bad faith because the parties met in 27 sessions, it engaged in no "obstreperous conduct" at the table and reached tentative agreement "on at least 16 issues." (Brief, p. 79). The reality is that almost all of those (minor) issues reflected the status quo that existed prior to the Union election, and thus were consistent with the *News-Press'* bad faith desire to turn back the clock to the pre-union period, which it insisted on, albeit politely, throughout the dozens of sessions. As ALJ Anderson declared,

> The Respondent during negotiations readily conceded, if not affirmatively declaimed, that its proposals and its bargaining intentions generally were designed to preserve the terms and conditions of unit employees, the status quo, without making

> substantive concessions to the Union. The items tentatively agreed upon during the course of the negotiations were essentially proposals either on procedural or process changes to the Respondent's then existing practices or, on covered minor or less significant matters. The management rights language in important ways sought to return the Respondent's rights not just to the status quo of the state of affairs when the Union was representing employees without a contract but seemingly to the earlier "pre-representation" time when there was not employee representative and the Respondent could take actions and make decisions without the duty or obligation to bargain with the unit employees' representative about such matters.
>
> ALJD, p. 135.

4. Good faith in the offing The *News-Press* also asks this Court to believe that despite its well-established rigidity at the table, and its failure to agree to a single union-originated proposal during the entire negotiation period, the parties' bargaining state was a work in progress with reason for optimism, because after all, "the parties were in the midst of negotiations and neither had declared impasse" as of the date the Union filed its ULP charge (Brief, p. 77). This Court in *USW v. NLRB*, *supra*, 390 F.2d at 849, where the employer refused to budge on a single important issue at the table (dues checkoff), delivered an apt rejoinder to that specious posture:

> The Company put forward on argument the possibility that a company may hold back a checkoff for trading purposes. Assuming that the disclosure of such business purpose would have enabled the Company to avoid the condemnation of bad faith, the simple fact is that in the case before us no such point was put forward to the Union in the bargaining sessions. Instead the Company hardened on an alleged point of principle -- a claim at odds with both its conduct, including the checkoff granted in 1961 to another union, and its concession that

> checkoff is a mandatory subject of bargaining. An employer disingenuous in its bargaining sessions must take the risk of being taken at face value and being held to have violated its duty, for good-faith bargaining requires "honest claims." *NLRB v. Truitt Mfg. Co.*, *supra*, 351 U.S. at 152.

Here, too, the *News-Press* made no suggestion either in the lengthy but barren negotiations period, or at the ULP trial, that it would compromise on any of its staunchly-held fundamentally destructive positions. The Court in the *USW* case noted, agreeing with the Trial Examiner , that "'if a party at the bargaining table espouses a position for the purpose of destroying or even crippling the other party to the negotiations, he has not bargained in good faith as required by the Act.' We approve this construction of the statute." That same observation applies to this appeal. It is simply fatuous in light of the *News-Press'* fundamentally union-destructive positions that it presented and set in concrete for it to nevertheless state that its conduct "had all the indicia that the company came to the table … to come to terms with the Union." (Brief, p, 80)

5. Journalistic Integrity is a Mandatory Bargaining Subject As noted above, the *News-Press'* complaints about away-from-table union conduct that it claims excuses or mitigates its bad faith, all stem from the pre-bargaining, pre-November, 2007 phase of these parties' disputes (Brief, pp. 68-69)[19].

[19] Petitioner puts no date on any of the events it complains of on page 69 of its brief, but they all pre-dated the beginning of bargaining and the Board's certification of the Union's electoral victory.

As for the Union's employee integrity proposals at the table, they never posed a threat of any kind to the *News-Press'* editorial prerogatives, notwithstanding the newspaper's constant refrain to that effect. Insofar as they involved questions of journalistic ethics, they sought incorporation of the *News-Press'* own stated ethical standards, and were legally consistent with *Peerless Publications*, 283 NLRB 334 (1987) (In 8(a)(5) case, after remand from *Newspaper Guild*, 636 F.2d 550 (D.C. Cir. 1980), Board orders rescission of entire set of ethics rules unilaterally implemented by management)

Insofar as the Union's proposals sought "byline protection" – of precisely the kind the union sought in *Peerless Publications*, 231 NLRB 244 (1977) – they were designed to ensure that reporters could participate in a writing and editing process (described above) that would enable reporters to discuss stories with editors, and remove their bylines from stories that have been edited in a manner with which they disagree (ALJD, pp. 12-13, 24). Nothing in those proposals inhibited the *News-Press* from publishing (or not publishing) any content it chose. Moreover, as has been manifest virtually since the Act was passed, such proposals have long been treated by the NLRB as mandatory subjects of bargaining for newspaper reporters, and therefore within the realm of proper bargaining in which Petitioner is dutybound to engage. E.g., *NLRB v. Knoxville Pub. Co*., 124 F.2d 875, 881 (6th Cir. 1942) ("Article XV provided that an employee writing under his

own signature should not be asked or expected to conform to the publisher's editorial policy at the expense of his personal convictions and that by-lines should not be used when the employee objected."); *Citizen-News*, 33 NLRB 511 (1941) enf den *NLRB v. Citizen-News Co.*, 134 F.2d 970, 973 (9th Cir. 1943); *Westinghouse Broadcasting*, 285 NLRB 205, 215 (1987).[20]

In the same vein, in *Express Publishing Company*, 13 NLRB 1213, 1217 (1939), enfd. in relevant part 111 F.2d 588 (C.A. 5), modified on non-pertinent grounds 312 U.S. 426, the Board held the employer violated the Act by refusing to bargain over the following union proposal: "no employee would be required to publish under his name any material containing an expression of opinion not in conformity with his opinion."

[20] The prevalence of byline integrity provisions in unionized newsrooms is noted in "*Who Owns "The First Rough Draft of History?': Reconsidering Copyright in News*," 27 Colum. J.L. & Arts 521, 554 (2004) ("The byline is something more than merely an acknowledgement of authorship; it is (or should be) a personal guarantee of good faith from reporter to reader. Byline "strikes," where reporters withhold their bylines in protest, often arise during contract negotiations but may also be used to publicly protest editorial policies or practices with which the reporters disagree.

In a section entitled "Employee Integrity," the Newspaper Guild's Model Contract provides that "An employee's byline or credit line shall not be used over the employee's protest." " (footnotes referring to byline strike occurrences at Washington Post, Portland Press Herald.))

In applying the permissive/mandatory bargaining subject distinction, Congress noted that the Board must utilize its expertise and consider a myriad of factors, including longstanding industry practice:

> The appropriate scope of collective bargaining cannot be determined by a formula; *it will inevitably depend upon the traditions of an industry*, the social and political climate at any given time, the needs of employers and employees, and many related factors. What are proper subject matters for collective bargaining should be left in the first instance to employers and trade unions, and in the second place, to any administrative agency skilled in the field and competent *to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country*, subject to review by the courts. It cannot and should not be strait-jacketed by legislative enactment. H. R. Rep. No. 245, 80th Cong., 1st Sess., 71 (1947).

*Ford Motor Company v. NLRB*, 441 U.S. 488, 496 fn.8 (1979). The Court went on to note that the considerations of whether a bargaining subject is or is not mandatory depends on whether it is "germane to the working environment" or, instead, "at the core of entrepreneurial control." 441 U.S. at 498. In that case, in which the Court approved the Board's finding that the price of in-plant cafeteria food provided to employees was a mandatory bargaining subject, it declared that "(a)lthough not conclusive, *current industrial practice is highly relevant in construing the phrase 'terms and conditions of employment*.'" 441 U.S. at 500. The Court further noted that it had relied upon the same criteria in the past, citing *Labor Board v. American Nat. Ins. Co.*, 343 U.S. 395, 408 (1952) ("While not determinative, it is appropriate to look to industrial bargaining practices in

appraising the propriety of including a particular subject within the scope of mandatory bargaining. Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process.") and *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964). See also, *NLRB v. Wooster Division of Borg-Wagner Corp.*, 356 U.S. 342, 347 (1958). As explained above, that industrial practice exemplified by the cited newspaper cases supports the Board's conclusion that the subject of byline integrity is mandatory under the Act. Because this Court should defer to this conclusion based on a long-held set of industrial practices, and should not interfere with the established dynamic of the mandatory/permissive scheme that delineates the parties' appropriate responses to bargaining proposals that fit one category or the other, and because the proposals expressly disavow any intent to influence newspaper content, the Union's proposals cannot be deemed a threat to the *News-Press* that frees it to commit unfair labor practices at will (see NLRB brief, pp. 69-70 and fn.17).

### C. The Board Properly Ordered Petitioner to Pay the Union's Bargaining Expenses

Relief for the News-Press' bargaining misconduct is not limited to, or fully addressed by, the conventional cease and desist order and posting that it likely anticipated in planning its patent bad faith bargaining strategy. Acknowledging the

fundamental defiance of basic good faith bargaining principles that informs this Employer's conduct at the table, exacerbated by its bellicose behavior away from it, the bargaining expense remedy is appropriate both because the *News-Press'* cursory objection to it is inadequate to preserve it, and because it is well within the Board's discretion and readily justified by the record evidence in this case.

Petitioner's bargaining misconduct resembles that of the employer in *Fallbrook Hosp. Co. v. NLRB*, 785 F.3d 729 (D.C. Cir. 2015)("Far from the run-of-the-mill failure to bargain, the Board specifically found that Fallbrook acted in an "obstinate and pugnacious manner," 2014 NLRB LEXIS 266 at *41, "operated with a closed mind and put up a series of roadblocks designed to thwart and delay bargaining," id., and that the totality of Fallbrook's conduct made it "clear" that "there was no intent to bargain," 2014 NLRB LEXIS 266 at *73. The Board found multiple violations of the Act based on Fallbrook's conduct at the bargaining table, including but not limited to refusing to bargain over mandatory subjects and refusing to provide information requested by the Union. 2014 NLRB LEXIS 266 at *3 & n.2; see also 2014 NLRB LEXIS 266 at *73). See also, *Camelot Terrace, Inc. v. NLRB, supra*, 824 F.3d at 1093-1094, 206 L.R.R.M. 3402.

As the Board's decision makes clear, a reimbursement remedy is appropriate "where it may fairly be said that [an employer's] substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects

cannot be eliminated by the application of traditional remedies." 2014 NLRB LEXIS 266 at *8 (internal quotation marks omitted) (quoting *Unbelievable, Inc.*, 318 N.L.R.B. 857, 859 (1995), enf'd in pertinent part, *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 326 U.S. App. D.C. 194 (D.C. Cir. 1997)). Such a remedy "is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table." *Unbelievable*, 318 N.L.R.B. at 859."

Judge Clifford Anderson found, and the Board agreed, that the *News-Press* committed 18 serious unfair labor practices, almost all during the bargaining period at issue in the case before him, and most impacting the entire 23-member bargaining unit. The Board found that the News Press bargained in bad faith right from the outset of negotiations on November 13, 2007, failed at least ten times to respect the Union as the exclusive bargaining representative by notifying it and offering to bargain over changes it sought to make in employment terms and conditions, and engaged in numerous instances of intimidation, coercion, direct-dealing and discrimination in violation of Sections 8(a)(1) and 8(a)(3).

As amply demonstrated in the record and summarized by the NLRB and this brief, Ampersand is seeking to destroy the Union, and return to the pre-election state of affairs. Ampersand has sought not merely to reduce wages, discontinue its

annual raise policy, and persist with "at will" employment; it has aggressively sought to regain the authority to unilaterally make changes in terms and conditions of employment that it lost as of September 27, 2006, even during the term of a one-year agreement it proposed. (Slip Op at 87-88)

The *News-Press* demanded unitary control over terms and conditions of employment that it had lost as of the day of the NLRB secret ballot election; the Board and the courts have long condemned such tactics as violative of the NLRA. It delayed in providing requested information relevant to bargaining; it misrepresented facts to the Union about its annual merit pay history, perhaps attempting to avoid liability for its unlawful discontinuation of that policy. It regularly made unilateral changes in terms and conditions of employment, and threatened employees if they talked about their situation outside the walls of their worksite. Coupled with its egregious misconduct away from the table, it's easy to see why recompense of Union bargaining expenses is an appropriate remedy in this case.

## V. CONCLUSION

Upon the foregoing, the brief submitted by the NLRB, and the record developed before the NLRB, Intervenor respectfully requests this Court to enforce the NLRB's order in its entirety, and to deny Petitioner's petition.

DATED: September 30, 2016

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**Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

1. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief is in compliance with the type-volume limitations set forth in Rule 32(a)(7)(B), and expanded in this Court's March 31, 2016 Scheduling Order, because it contains 8559 words, exclusive of those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 10, Times New Roman, 14 point.

DATED: September 30, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2016, copies of the foregoing **Intervenor's Brief** was served on the following counsel of record through the CM/ECF system if they are registered users, or, if they are not, by serving a true and correct copy at the addresses listed below:

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